

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J.G. HARRINGTON
DIRECT DIAL 202-776-2818
jharrington@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ORIGINAL
ORIGINAL

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

October 8, 1998

VIA HAND DELIVERY

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Oral Ex Parte Presentation
CC Docket No. 96-45
AAD/USB File No. 98-37

Dear Ms. Salas:

On Wednesday, October 7, 1998, Kenneth D. Salomon and Leonard J. Kennedy of this office, counsel for the Iowa Telecommunications and Technology Commission (the "ITTC"), met with Thomas Power, Legal Advisor to Chairman William E. Kennard, Kyle D. Dixon, Legal Advisor to Commissioner Michael K. Powell and Paul Gallant, Legal Advisor to Commissioner Gloria Tristani, regarding the above-referenced matter. During the meeting, they discussed the nature of the ITTC's request, the standards for determining whether an entity is a common carrier or a private carrier under existing precedent and the nature of the services provided by the Iowa Communications Network. A copy of a handout provided to Mr. Power, Mr. Dixon and Mr. Gallant which describes the substantive aspects of the meeting, is attached.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and copies are being provided to Mr. Power, Mr. Dixon and Mr. Gallant. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,


J.G. Harrington

JGH/lsr

cc (w/o attach.): Thomas Power, Esq.
Kyle D. Dixon, Esq.
Paul Gallant, Esq.

No. of Copies rec'd
List ABCDE

0+1

EX PARTE OR LATE FILED

RECEIVED

OCT - 8 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IOWA COMMUNICATIONS NETWORK
REQUEST FOR DETERMINATION OF CARRIER STATUS
CC Docket No. 96-45 AAD/USB File No. 98-37

+++

PRINCIPLES OF USE OF THE NETWORK

The Iowa Communications Network ("ICN" or the "Network") is a unique state-owned entity that provides telecommunications and related services to higher education institutions, education agencies, schools, libraries and health care institutions in Iowa. ICN's services are provided over a network that includes some elements purchased from other carriers and some elements owned and operated by ICN, *i.e.*, significant fiber capacity, switches and high speed data hubs across the State. The following is a description of the general principles surrounding the use of ICN's services. **AS DESCRIBED BELOW, ALL ENTITIES ELIGIBLE FOR SUPPORT UNDER THE COMMISSION'S SCHOOL, LIBRARY AND RURAL HEALTH CARE RULES ARE FREE TO CHOOSE TO USE OR NOT TO USE ICN'S SERVICES AT ANY TIME.**

Optional Use

Most entities served by ICN can choose whether or not to use ICN's services at will. There is only one class of user that is restricted in its use of the Network, namely higher education institutions. Higher education institutions are *not* eligible to participate in the schools and libraries program and, in any event, all but two of the Iowa higher education institutions opted to connect to the ICN.

- Pursuant to Section 8D.9(1), schools, libraries, health care providers and state agencies are *not* required to purchase any supported services from ICN. Rather, schools, libraries and health care facilities (hospital or physician clinics) are free to *choose* ICN and the services offered. IOWA CODE § 8D.9(1). Schools, libraries and health care facilities were not and are not subject to any deadline for "opting in" to ICN.
- ICN's telemedicine services are available to any facility that has a doctor and ICN's distance learning services are available to all providers of educational services, including colleges, public and private elementary and secondary schools and even home schoolers.
- Schools, libraries and health care institutions (hospitals and physician clinics) can opt out of ICN freely, without obstacles. Indeed, the statute permits these entities to choose whether or not to use ICN. *See* IOWA CODE § 8D.9(2) (describing scope of waiver requirement); IOWA CODE § 8D.9(1) (describing class of entities subject to § 8D.9(2), and excluding schools, libraries, health care institutions and other listed entities from that class).

“Required” Use

The Iowa statute contains a nominal requirement for certain agencies to use the Network. In practice, these agencies are effectively free to opt out upon request.

- The only agencies that are required to use ICN absent a waiver are higher education institutions and area education agencies that opted in to the Network. IOWA CODE § 8D.9(1). Other users, including schools, libraries, health care facilities, state agencies and federal agencies, are not subject to any requirement to use ICN.
- The agencies that are subject to the required use provision can terminate their service from the ICN on various grounds, including: (1) the user can obtain the services at a lower cost from another provider; (2) the user has a contract with a different provider in place; and (3) the contract with ICN does not cover all of the user’s needs. In other words, the statute provides that an ICN user can use another provider — without any penalty — whenever doing so is advantageous, and better terms than are available. IOWA CODE § 8D.9(2).
- While Section 8D.9(2) is characterized as a “waiver” provision by the statute, the users seeking to opt out of ICN are not subjected to any significant scrutiny when seeking to obtain services elsewhere. Indeed, *every* “waiver” request filed under Section 8D.9(2) has been granted and many of the private colleges — eleven to be exact — that have certified that they intended to use the Network have *chosen* not to do so.

Limits on the Use ICN Service by Otherwise Eligible Entities

There is a very limited number of entities that were required by Iowa statute to decide by July 1, 1994, whether to use the Network. IOWA CODE § 8D.9(2).

- Only higher education institutions and area education agencies were subject to the July 1, 1994 statutory opt in restriction. IOWA CODE § 8D.9(1).
- The purpose of this provision was solely to advise the State whether ICN fiber should be extended to the institution.
- The overwhelming majority of users can opt in and out of the Network. Indeed, schools, libraries, health care institutions (hospitals and physician clinics), state agencies and federal agencies were not subject to the July 1, 1994 opt in provision and can choose whether or not to use the Network without restriction.

- In practice, all area education agencies in the State of Iowa chose to use ICN by the July 1, 1994 selection date. Among Iowa education institutions, only two private colleges did not choose to certify. The choice of whether or not to opt in belonged entirely to the institutions.
- Many of the higher education institutions that opted in to ICN do not, at present, use any ICN services. These colleges and universities retain the ability to use ICN whenever they deem it advantageous to do so.
- Even if the Commission were to determine that ICN was not a carrier for higher education institutions, ICN is nonetheless a carrier for all other Iowa entities eligible for universal service support. Indeed, it has never been the case that an entity must serve the entire public before it can be a carrier. Rather, it is well established that a carrier may choose to accept only certain types of businesses or customers so long as it accepts those types of customers indifferently. An entity may be a common carrier even though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.

CHAPTER 8B

MIDWEST NUCLEAR COMPACT

Transferred to chapter 15D in Code 1993

CHAPTER 8C

MIDWEST INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMPACT

Transferred to chapter 457B in Code 1983

CHAPTER 8D

IOWA COMMUNICATIONS NETWORK

Appropriations for connection of Part III users;
legislative intent regarding plan for additional connections;
construction and state ownership of identified sites;
metro connections; 95 Acts, ch 217; 96 Acts, ch 1809

- | | | | |
|------|---|-------|---|
| 8D.1 | Purpose. | 8D.8 | Scheduling for authorized users. |
| 8D.2 | Definitions. | 8D.9 | Certification of use — network use by certain authorized users. |
| 8D.3 | Iowa telecommunications and technology commission — members — duties. | 8D.10 | Report of savings by state agencies. |
| 8D.4 | Executive director appointed. | 8D.11 | Powers — facilities — leases. |
| 8D.5 | Education telecommunications council established — regional councils established. | 8D.12 | Disposition of network — approval of general assembly and governor. |
| 8D.6 | Advisory groups established. | 8D.13 | Iowa communications network. |
| 8D.7 | Telecommunications advisory committee. | 8D.14 | Iowa communications network fund. |

8D.1 Purpose.

It is the intent of the general assembly that communications of state government be co-ordinated to effect maximum practical consolidation and joint use of communications services.

[C71, 73, §8A.1; C75, 77, 79, 81, §18.132]
83 Acts, ch 126, §3; 94 Acts, ch 1184, §29
C95, §8D.1

8D.2 Definitions.

When used in this chapter, unless the context otherwise requires:

1. "Commission" means the Iowa telecommunications and technology commission established in section 8D.3.
2. "Director" means the executive director appointed pursuant to section 8D.4.
3. "Network" means the Iowa or state communications network.
4. "Private agency" means an accredited non-public school, a nonprofit institution of higher education eligible for tuition grants, or a hospital licensed pursuant to chapter 135B or a physician clinic to the extent provided in section 8D.13, subsection 16.

5. "Public agency" means a state agency, an institution under the control of the board of regents, the judicial department as provided in section 8D.13, subsection 17, a school corporation, a city library, a regional library as provided in chapter 256, a county library as provided in chapter 336, or a judicial district department of correctional services established in section 905.2, to the extent provided in section 8D.13, subsection 15, an agency of the federal government, or a United States post office which receives a federal grant for pilot and demonstration projects.

6. "State communications" refers to the transmission of voice, data, video, the written word or other visual signals by electronic means but does not include radio and television facilities and other educational telecommunications systems and services including narrowcast and broadcast systems under the public broadcasting division of the department of education, department of transportation distributed data processing and mobile radio network, or law enforcement communications systems.

[C71, 73, §8A.2; C75, 77, 79, 81, §18.133]
83 Acts, ch 126, §4, 5; 86 Acts, ch 1245, §308,

by each of the appointing authorities under subsection 1. Additional ex officio, nonvoting members may also be appointed to the regional telecommunications councils. The regional telecommunications councils shall advise the education telecommunications council on the assessment of local educational needs, and the coordination of program activities including scheduling. The community college located in the merged area of a regional telecommunications council shall staff and facilitate the activities of the council. The community college and the council may enter into a chapter 28E agreement for such arrangement.

3. The community college in each of the merged areas shall be responsible for switching of Parts II and III of the network and for facilitating the organization and meetings of the regional telecommunications council.

94 Acts, ch 1184, §7

8D.6 Advisory groups established.

1. The commission shall establish an advisory group to examine the use of the network for telemedicine applications. The advisory group shall consist of representatives of hospitals and other health care facilities as determined by the commission.

2. The commission may establish other advisory committees as necessary representing authorized users of the network.

94 Acts, ch 1184, §8

8D.7 Telecommunications advisory committee.

A telecommunications advisory committee is established to advise the commission on telecommunications matters. The commission shall appoint five members to the advisory committee who shall represent specific telecommunications industries or persons with technical expertise related to the network.

94 Acts, ch 1184, §9

8D.8 Scheduling for authorized users.

Except as provided in section 8D.5, an authorized user is responsible for all scheduling of the use of the authorized user's facility. A person who disputes a scheduling decision of such user may petition the commission for a review of such decision pursuant to section 8D.3, subsection 3, paragraph c.

94 Acts, ch 1184, §10

8D.9 Certification of use — network use by certain authorized users.

1. A private or public agency, other than a state agency, local school district or nonpublic school, city library, regional library, county library, judicial department, judicial district department of correctional services, agency of the federal government, a hospital or physician clinic, or a post office

authorized to be offered access pursuant to this chapter as of May 18, 1994, shall certify to the commission no later than July 1, 1994, that the agency is a part of or intends to become a part of the network. Upon receiving such certification from an agency not a part of the network on May 18, 1994, the commission shall provide for the connection of such agency as soon as practical. An agency which does not certify to the commission that the agency is a part of or intends to become a part of the network as required by this subsection shall be prohibited from using the network.

2. a. A private or public agency which certifies to the commission pursuant to subsection 1 that the agency is a part of or intends to become a part of the network shall use the network for all video, data, and voice requirements of the agency unless the private or public agency petitions the commission for a waiver and one of the following applies:

(1) The costs to the authorized user for services provided on the network are not competitive with the same services provided by another provider.

(2) The authorized user is under contract with another provider for such services, provided the contract was entered into prior to April 1, 1994. The agency shall use the network for video, data, and voice requirements which are not provided pursuant to such contract.

(3) The authorized user has entered into an agreement with the commission to become part of the network prior to June 1, 1994, which does not provide for use of the network for all video, data, and voice requirements of the agency. The commission may enter into an agreement described in this subparagraph upon a determination that the use of the network for all video, data, and voice requirements of the agency would not be in the best interests of the agency.

b. A private or public agency shall petition the commission for a waiver of the requirement to use the network as provided in paragraph "a", if the agency determines that paragraph "a", subparagraph (1) or (2) applies. The commission shall establish by rule a review process for determining, upon application of an authorized user, whether paragraph "a", subparagraph (1) or (2) applies. An authorized user found by the commission to be under contract for such services as provided in paragraph "a", subparagraph (2), shall not enter into another contract upon the expiration of such contract, but shall utilize the network for such services as provided in this section unless paragraph "a", subparagraph (1), applies.

94 Acts, ch 1184, §11

8D.10 Report of savings by state agencies.

A state agency which is a part of the network shall annually provide a written report to the general assembly certifying the identified savings associated with the state agency's use of the network. The report shall be delivered on or before January 15 for the previous fiscal year of the state agency.

94 Acts, ch 1184, §12